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In The

# Supreme Court of the United States

October Term, 1995

BENITO IADAROLA,

*Petitioner,*

*vs.*

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent.*

VICTOR IADAROLA,

*Petitioner,*

*vs.*

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent.*

*Petition for Writ of Certiorari to the Supreme Court of New York, Appellate Division, Second Department*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

I. Whether the FBI's long-term violation, over a period of ten years, of 28 U.S.C. § 533, the FBI Guidelines for Confidential Informants and related statutes, deprived petitioners of their constitutional rights to due process and a fair trial by the court below refusing to instruct the jury that petitioners' reasonable belief they were authorized to commit low-level criminal acts would negate the specific intent element of the crime with which they were charged, or, in the alternative, that a finding of entrapment by estoppel would merit acquittal.

II. Whether petitioners, both of whom were long-term undercover informants for the FBI and the Kings County N.Y. District Attorney's Office, and acknowledged by the FBI to be "essential" in providing information against organized crime, were deprived of their constitutional rights to due process and a fair trial by the court below refusing to charge the jury on their requested defense of lack of specific intent to commit the crimes upon their reasonable belief they were acting on the authority granted to them by said law enforcement officials.

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## OPINION BELOW

The opinion of the Supreme Court of the State of New York, Appellate Division, Second Department (Pet. App. at 5a) is reported at *People v. Benito Iadarola*, 634 N.Y.S.2d 738, 1995 N.Y. App. Div. Lexis 12516. The Certificate Denying Leave of the State of New York Court of Appeals for *People v. Benito Iadarola* is unpublished. (Pet. App. at 1a).

The opinion of the Supreme Court of the State of New York, Appellate Division, Second Department (Pet. App. at 7a) is reported at *People v. Victor Iadarola*, 634 N.Y.S.2d 738, 1995 N.Y. App. Div. Lexis 12517. The Certificate Denying Leave of the State of New York Court of Appeals for *People v. Victor Iadarola* is unpublished. (Pet. App. at 3a).

## STATEMENT OF JURISDICTION

Timely petitions for appeal were denied by the Court of Appeals of the State of New York by Certificates Denying Leave entered on December 20, 1995. (Pet. App. at 1a, 3a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment, provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same

> offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Sixth Amendment, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Fourteenth Amendment, Section 1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person

> within its jurisdiction the equal protection of the laws.

28 U.S.C. § 533 provides:

> The Attorney General may appoint officials—(1) to detect and prosecute crimes against the United States; (2) to assist in the protection of the person of the President; and (3) to conduct such other investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General.
>
> This section does not limit the authority of departments and agencies to investigate crimes against the United States when investigative jurisdiction has been assigned by law to such departments and agencies.

Other relevant statutes and regulations involved appear in the appendix: 28 U.S.C. § 534 (Pet. App. at 10a); 28 U.S.C. § 547 (Pet. App. at 12a); 28 C.F.R. § 0.85 (Pet. App. at 13a); 28 C.F.R. § 0.85a (Pet. App. at 17a); N.Y. Penal Law § 35.05 (Pet. App. at 18a); and N.Y. Penal Law § 460.20 (Pet. App. at 19a).

## STATEMENT OF THE CASE

For many years prior to 1981, petitioners engaged in low-level, non-violent criminal activity involving mutual race horse policy operations where many of the bets placed were in the range of 10 to 25 cents. Recognizing that their positions as "bookies" with a successful numbers operation permitted petitioners to obtain confidential information regarding

organized crime, the FBI in 1981 recruited petitioners to act as confidential informants against the Bonnano and Gambino crime families. *See, e.g.*, Record Below (hereafter "R.") at pages 5026-27, 5054-55, 5339-40, 5346-47, 5402.

Several months after the petitioners began to work for the FBI, they were indicted by the Kings County of New York District Attorney's Office ("District Attorney") for various gambling charges. The FBI facilitated a plea bargain for the petitioners, with the understanding that the FBI would continue to use petitioners as confidential informants, supervise their activities, and forward any relevant confidential information supplied by petitioners to the District Attorney or other state law enforcement agencies.[1] R. at 5337, 5367-68, 5484-86.

The petitioners remained confidential informants over a period of ten years, working under the supervision of at least six different FBI agents (who also supervised petitioners on behalf of the District Attorney). R. at 5288. On approximately 100 occasions during those ten years, petitioners provided the FBI with undercover information on a wide variety of serious activities of organized crime, including highjacking, a triple murder and other homicides. R. at 5290-94. The FBI forwarded pertinent undercover information to local law enforcement authorities, including the Kings County District Attorney, as agreed in 1981, but without revealing to the state authorities that petitioners were the source of that information. *See, e.g.*, R. at

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1. One of the supervising FBI agents testified at trial as follows: "As I recall, what I had discussed with the assistant [King's County District Attorney] that was handling the case was that both the [Iadarolas] were providing information and assistance to me regarding federal investigations. I would like to continue to use them in that capacity and that if any information were generated by either of them or both of them that would relate to state investigations, that I would contact appropriate state authorities and pass that information onto them." R. at 5368-70.

5029, 5031, 5036, 5037, 5039-41, 5302-05, 5333-35, 5399-5400, 5485, 5649.

The importance of the information provided by petitioners for the federal and state fight against organized crime is illustrated by the fact that on at least two occasions, once in 1981 and again in 1989, petitioners' supervising FBI agents intervened on their behalf when petitioners faced indictment on state gambling charges.[2] When petitioners withdrew from the informant program in the mid-1980's, fearing reprisals from the Gambino crime family, FBI upper management actively sought to reinstate petitioners as informants because of their value as informants. R. at 5374. Even after the District Attorney informed the FBI that petitioners were targeted for indictment by state authorities, the FBI continued to use petitioners as informants, obtaining additional information on the Gambinos, Bonnanos and the number one target of both federal and New York state law enforcement authorities, John Gotti. R. at 5405-06, 5414.

Two of petitioners' supervising FBI agents presented undisputed testimony at trial that *(1)* the FBI considered petitioners to be "essential" informants in its fight against organized crime, R. at 5374, 5594, *(2)* since 1981, the FBI was aware of the nature (though not necessarily the extent) of petitioners' on-going criminal gambling activities, R. at 5368-71, 5542-43, 5595-97, *(3)* over the ten years, their supervising FBI agents explicitly discussed those on-going illegal activities with petitioners, R. at 5596-97, *(4)* those on-going criminal activities were the sole reason petitioners were able to obtain the information, R. at 5290, (5) petitioners were never ordered or asked to desist from those known activities, R. at 5290, 5349,

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2. The petitioners were so essential as informants that the FBI warned them of a wire-tap by the Kings County District Attorney's Office and an impending police raid of petitioners' gambling operation. *See, e.g.*, R. at 5042-45, 5048-49, 5119-20, 5194-96, 5383, 5391.

5476, 5594, and *(6)* if petitioners' gambling activities had ceased, the FBI would have terminated the services of petitioners, who, as law-abiding citizens, would have been of absolutely no undercover value to the law enforcement authorities. R. at 5290.

The FBI actively encouraged and supported petitioners' continuing participation as confidential informants. R. at 5374-75. One agent admitted that it was only due to his own inadvertence that proper authorization for petitioners' criminal activities was not obtained, a procedural oversight rather than a conscious decision by the FBI to withhold such authorization. R. at 5287. The agent also admitted that he never informed petitioners of his "inadvertent" omission to obtain authorization. R. at 5287, 5289. In contrast, petitioner Benito Iadarola testified the FBI agents specifically authorized petitioners to continue their criminal activity. R. at 5648-50.

However, the agents also testified that internal FBI Guidelines require that any informant who engages in unauthorized federal or state criminal activity must be immediately dismissed from the informant program.[3] R. at 5289-

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3. "[W]henever a Special Agent learns of the commission of a serious crime by an informant or confidential source, he shall notify a field office supervisor. The supervisor shall make a determination whether to notify appropriate state or local enforcement or prosecutive authorities of any violation of law and shall make a determination whether continued use of the informant or confidential source is justified . . . . In determining whether to notify appropriate state or local law enforcement or prosecutive authorities of criminal activity by FBI informants and confidential sources, the FBI shall consider: (a) whether the crime is completed, imminent or inchoate; (b) the seriousness of the crime in terms of danger to life and property; . . . (f) the effect of notification on FBI investigative activity. Clifford Zimmerman, *Toward a New Vision of Informants: A History of Abuses and Suggestions for Reform*, 22 Hastings Const. L. Q. 81, 177-78, n. 320 (1994) *quoting Attorney General's Guidelines on FBI Use of Informants and Confidential Sources* (hereafter "Toward a New Vision of Informants").

5290, 5473, 5595-96. *See, e.g., United States v. Phillips*, 854 F.2d 273, 275 (7th Cir. 1988). Despite the Guidelines' clear requirement for immediate termination, the agents used petitioners as informants from 1981 at least through June of 1990 though admittedly knowing that petitioners at all times engaged in the illegal gambling activities that served as the sole source of their undercover information to the FBI and the District Attorney's office.

**A. Prior Legal Proceedings**

The federal questions raised herein were timely and properly raised so as to give the Supreme Court jurisdiction to review the judgment on writ of certiorari.

*i. At Trial*

As a result of their gambling activities, petitioners were convicted by a jury of violating New York's Enterprise Corruption statute, Penal Law 460.20, which proscribes intentionally participating in and advancing the affairs of a criminal enterprise Pet. App. at 19a.

During trial, defense counsel requested that the trial judge charge the jury with instructions on direct authority, apparent authority, and that petitioners, as confidential informants of ten years standing, had a reasonable belief that they were acting as authorized agents in assistance to law enforcement activity. The defense also submitted to the trial court the following request to charge, adopted from the case of *United States v. Barker*, 546 F.2d 940 (D.C. Cir. 1976):

> If a person engages in conduct which violates a criminal statute with the reasonable belief

> that he or she is acting as an authorized government agent to assist in law enforcement activity, then that person may not be convicted of violating the criminal statute because the criminal intent is lacking."

The trial court made it clear that none of the requested instructions would be presented to the jury. R. at 3169, 5229, 5450, 5516-23. The court stated it would only charge the jury that the petitioners intended to commit the crime, and could only be acquitted if the jury found they were justified in intentionally committing those crimes as a "public servant" pursuant to New York Penal Law § 35.05. R. at 5450. Pet. App. at 18a. The trial court insisted that petitioners had to show they were agents of the FBI, acting under explicit authority. R. at 5134.

*ii. Appellate Division*

On appeal to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, petitioners renewed the objections raised at trial that the State must prove beyond a reasonable doubt the petitioners' intention to commit the crime charged, citing as support the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. While the Appellate Division conceded that there was evidence presented suggesting petitioners were FBI informants, it stated "there is no proof that the defendant[s] did not intend to participate in the gambling enterprise with which [they were] so charged." ***People v. Victor Iadarola***, 634 N.Y.S. 2d 738, 1995 N.Y. App. Div. Lexis 12517.

The Appellate Division held incorrectly that the reasonable belief defense (also known as entrapment by estoppel) has no

basis in New York law,[4] ignoring, as did the trial court, a long line of New York and federal cases to the contrary, as well as the FBI's violation of 28 U.S.C. § 533 and its internal Guidelines.

*iii. Court of Appeals*

The Court of Appeals let stand, without comment, the Appellate Division decision by denying petitioners' request for leave to appeal.

## REASONS FOR GRANTING THE PETITION

### I.

### THE FBI'S VIOLATION OVER A TEN-YEAR PERIOD OF 28 U.S.C. § 533 AND THE FBI GUIDELINES REGARDING CONFIDENTIAL INFORMANTS CONSTITUTIONALLY COMPEL INSTRUCTIONS TO THE JURY REGARDING PETITIONERS' SPECIFIC INTENT AND ESTOPPEL AGAINST THE GOVERNMENT.

The Due Process Clause of the Fifth Amendment, the Compulsory Process or Confrontation Clauses of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment of the Constitution guarantee a criminal defendant "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). *See also*, *United States v. Abcasis*, 45 F.3d 39, 45 (2d Cir. 1995), *Williams v. Lord*,

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4. *See, e.g., People ex rel. Hegeman v. Corrigan*, 195 N.Y. 1, 12, 87 N.E. 792 (1909) ("[I]t is very apparent that the innocence or criminality of the intent in a particular act generally depends on the knowledge or belief of the actor at the time. An honest and reasonable belief in the existence of circumstances which, if true, would make the act for which the petitioner is prosecuted innocent, would be a good defense.")

996 F.2d 1481, 1483 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1073 (1994). An essential dimension of that meaningful opportunity is an instruction to a jury for "any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *United States v. Goldson*, 954 F.2d 51, 55 (2d Cir. 1992), (*quoting Mathews v. United States*, 485 U.S. 58, 63, 108 S. Ct. 883, 887 (1987)). The decisions below threaten to unsettle this fundamental legal principle and unconstitutionally widen the scope of criminal activities that law enforcement officials may authorize informants to engage in during an investigation.

In *Sherman v. United States*, 356 U.S. 369 (1958), this Court held that the government could not make use of an informant and then claim disassociation through ignorance of the way in which he operated. "Informant mishandling and misconduct victimizes many innocent people. Examples of the resulting harm include: prosecutions based upon informant perjury; false arrests due to unreliable informants; non-disclosure of informant information by prosecutors in criminal proceedings; informant abuses promoted through rewards; and felonious activity committed with the knowledge and, at times, assent of the police and prosecutors." *Toward a New Vision of Informants* at 83 (1994).

Congress has encouraged the use of confidential informants as "an effective means — sometimes the only effective means — of detecting, investigating, successfully prosecuting, and thereby deterring [concealed offenses, such as crimes committed by highly sophisticated, well-insulated criminal organizations and consensual crimes, including official corruption]." Katherine Goldwasser, *After Abscam: An Examination of Congressional Proposal to Limit Targeting Discretion in Federal Undercover Investigations,* 36 Emory L.J. 75, 78 (1987). *See also Sorrels v. United States,* 287 U.S. 435, 453-54 (1932). Congress has also enacted specific statutory provisions manifesting a policy judgment that the FBI should abide by its

internal Guidelines, and communicate to the proper authorities the commission of crimes made pursuant to its investigations. Pursuant to 28 U.S.C. § 533, officials of Federal Bureau of Investigation have a legal duty to take whatever steps are necessary to bring criminal charges against suspect criminals, including timely informing prosecutorial authorities in the Department of Justice that crime has allegedly been committed. This duty is especially applicable where the FBI's own informants have been involved in criminal activity. *See, e.g., Bergman v. United States*, 565 F. Supp. 1353 (W.D. Mich. 1983). *Cf. Department of Justice v. Landano*, 508 U.S. 165 (1993) (investigating state crimes is part of FBI's investigative power).

As petitioners noted on appeal below, the FBI Guidelines and § 533 established an affirmative duty for petitioners' government supervisors to not only have terminated their services early on, but to have reported petitioners' allegedly unauthorized criminal activities to the same District Attorney's office that had been the recipient of petitioners' confidential information. However, the issue here is not whether these Guidelines create a legal right for petitioners to sue the government, but whether § 533 and the Guidelines constitutionally compel an instruction to the jury regarding petitioners' intent and estoppel against the government. *See, e.g., Payton v. United States*, 679 F.2d 475 (5th Cir. Unit B 1982) (holding that when government undertakes to perform services which would not be required in the absence of specific legislation, it will be liable if these activities are performed negligently), *Liuzzo v. United States*, 508 F. Supp. 923 (E.D. Mich. 1981) (holding that an assertion that the Government, through the wrongful acts of FBI informant and agents was responsible for a murder, attacked the implementation of the FBI's policy regarding the use of informants but not the discretionary policy itself, and therefore, such claims were not barred under the discretionary function exception to the Federal Tort Claims Act).

The lower court's decision unravels nearly three decades of congressional legislation aimed at curbing the abuses of federal law enforcement and increasing the effectiveness of the war against organized crime.[5] Congress has recognized the special value of informants, the importance of their missions and the risks they endure. For example, to encourage the participation of informants, statutory safeguards protect their privacy and identity.[6] Congress has acted because organized crime costs Americans "more than all other types of crime combined, and just about double the amount spent annually in the United States for all police, court and correction work." *In re Persico*, 522 F.2d 41, 47 (2d Cir. 1975) (quoting Cressey, *Organized Crime and Criminal Organizations* 10-11 (1971). Thus it is not surprising that the FBI made every effort, including intercession with local authorities, to maintain petitioners as informants when they had proven themselves to be of such great value in the fight against organized crime.

Organized criminals focus on consensual crimes, such as drug and weapons trafficking, prostitution, and gambling. "Such transactions are the most difficult crimes to detect because they typically occur in private between willing participants who rarely complain to the police. Because of the difficulties inherent in detecting and successfully prosecuting consensual crimes, federal and state law enforcement agencies often use undercover agents and informants in their efforts to expose the offenses."

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5. "All of these guidelines state that laws should not be violated and — that any criminal conduct should be reported to local law enforcement authorities. *Toward a New Vision of Informants* at 133, *citing Attorney General's Guidelines on Criminal Investigations of Individuals and Organizations.*

6. *See, e.g.*, 5 U.S.C. §552a(k)(5), 5 U.S.C. § 552(b)(7)(C). That explains in part why the FBI did not reveal petitioners as the source of information provided to the District Attorney from 1981 through 1990.

Fred Warren Bennett, *From Sorrells to Jacobson: Reflections on Six Decades of Entrapment Law, and Related Defenses, in Federal Court*, 27 Wake Forest L. Rev. 829, 831 (1992). Government agents are also motivated to competently supervise their informants by legal necessity. Before one can act as informant he or she must go through a suitability and pertinence review. R. at 5278. The agents have to provide an affidavit as to the reliability of an informant if the information provided by that informant is the basis of a request for a search warrant or a wire tap. *See, e.g., Morrow v. State*, 249 S.E. 2d 110 (Ga. 1978), *cert. denied*, 440 U.S. 917 (1979). On several occasions, petitioners provided the government with information used to justify requests for wire tapping, search warrants and camera surveillance. R. at 5334-35, 5583.

At some point after 1981 when petitioners first became informants, but years before 1991 when they were ultimately indicted, their law enforcement supervisors had an obligation to inform the petitioners that their known gambling activities exceeded the scope of the FBI Guidelines. This responsibility was particularly acute considering the fact that the agents themselves testified that the petitioners' gambling activities were the only reason petitioners were kept as informants. The conclusion that petitioners were never reported or terminated because their activities were authorized and within the Guidelines is buttressed by the trial testimony by one of the supervising FBI agents that if unauthorized criminal acts are committed by an informant, "the Bureau cannot intercede." R. at 5175. It is undisputed that the Bureau did intercede on at least two occasions, 1981 and 1989. These intercessions could have affected the petitioners' specific intent and the jury should have been so instructed.

A finding petitioners were entitled to jury instructions on "reasonable belief" and "entrapment by estoppel" will promote

the underlying policies behind the use of confidential informants to assist law enforcement agencies in their criminal investigation and will not in any way undermine the correct enforcement of a particular law. *United States v. Corso*, 20 F.3d 521 (2d Cir. 1994). First, it will encourage government law enforcement officials to better know and articulate the law and to follow standard procedures.[7] *United States v. Etheridge*, 932 F.2d 318, 321 (4th Cir. 1991), *cert. denied*, 502 U.S. 917 (1991). Second, it will protect a fundamental constitutional principle of due process and fairness. Third, the government has a compelling interest to maintain the integrity of confidential informant program.

Organized crime investigations often take years of careful, painstaking and dangerous undercover operations.[8] If the case below stands, law enforcement authorities, in their national war against organized crime, will be given a constitutional green light to knowingly engage the services of long-term confidential

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7. Congress has enacted other statutes imposing a duty on the FBI to collect and exchange information with "authorized officials of the Federal Government, the States, cities, and penal and other institutions." 28 U.S.C. §§ 534(a)(1) & (a)(4). The Director of the Federal Bureau of Investigation is required to "[i]nvestigate violations of the laws . . . of the United States and collect evidence in cases in which the United States is or maybe a party in interest." 28 C.F.R. § 0.85(a) (1982). Subsection (g) further requires that the FBI operate its laboratory to assist "all duly constituted law enforcement agencies." Courts interpreting § 28 U.S.C. § 547 have consistently ruled that this statute does not exempt United States Attorneys from their obligations to act fairly and with proper deference to the rights of the accused.

8. *See, e.g., United States v. Gambino*, 59 F.3d 353 (2d Cir. 1995) ("The Gambino organization, one of the most notorious organized crime families in the United States, was the subject of a series of investigations that involved an immense amount of electronic surveillance. These investigations, which culminated in the conviction of the organization's leader, John Gotti, along with other high-ranking members, was a much-trumpeted triumph for law enforcement.").

informants whose violations of state law are the sole source of their information, without a concomitant requirement that the law enforcement agencies dismiss the informants or that a jury be permitted to consider the effect of such long-term engagement on a defendant's intent to commit a crime or to estop the government from prosecution.

## II.

## THE DECISION BELOW UNSETTLES A FUNDAMENTAL PRECEPT OF CONSTITUTIONAL LAW THAT A DEFENDANT IS ENTITLED TO AN INSTRUCTION AS TO ANY RECOGNIZED DEFENSE FOR WHICH THERE EXISTS EVIDENCE SUFFICIENT FOR A REASONABLE JURY TO FIND IN HIS FAVOR.

"It is hornbook law that an accused is entitled to an instruction on his theory of defense so long as the theory is a valid one and there is evidence in the record to support it." *United States v. Rodriguez*, 858 F.2d 809, 812 (1st Cir. 1988). This fundamental precept has been endorsed by every single federal circuit.[9] Even when the supporting evidence is weak or of doubtful credibility, its presentation at trial requires an instruction on the theory of defense. *United States v. Garner*, 529 F.2d 962, 970 (6th Cir. 1976) (citations omitted), *cert. denied*, 429 U.S. 850. A "criminal defendant is entitled to instructions relating to his theory of defense, for which there is some foundation in the proof, no matter how tenuous that defense may

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9. *See, e.g., Virgin Islands v. Isaac*, 50 F.3d 1175, 1180 (3d Cir. 1995); *United States v. Grissom*, 44 F.3d 1507, 1512 (10th Cir. 1995), *cert. denied*, 115 S. Ct. 1720 (1995); *United States v. Brown*, 33 F.3d 1002, 1004 (8th Cir. 1994); *United States v. Maseratti*, 1 F.3d 330, 336 (5th Cir. 1993); *United States v. McGill*, 953 F.2d 10, 12 (1st Cir. 1992); *United States v. Simas*, 937 F.2d 459, 462 (9th Cir. 1991); *United States v. Gibbs*, 904 F.2d 52, 58 (D.C. Cir. 1990); *United States v. Alston*, 895 F.2d 1362, 1367 (11th Cir. 1990).

appear to the trial court." *United States v. Dove*, 916 F.2d 41, 47 (2d Cir. 1990). Upon defendant's request, the court must instruct the jury on the defense if it is sufficiently supported by the evidence; failure to do so may constitute reversible error. *People v. Watts*, 57 N.Y.2d 299, 301 (1982).

It is the province of the jury to determine the credibility of the evidence. *United States v. Timberlake*, 559 F.2d 1375 (5th Cir. 1977) (failing to instruct on a theory of defense for which there is any foundation in the evidence is reversible error). Therefore, if there was any basis whatsoever to support a theory of reasonable belief[10] or entrapment by estoppel, the jury should have been so instructed to consider that in its deliberations.

At trial, evidence was presented that for ten years the FBI retained and supervised petitioners as informants only because petitioners successfully engaged in the very criminal activities for which they were ultimately convicted. Petitioners were constitutionally entitled to a jury instruction that this evidence could be considered either to negate petitioners' intent to commit the criminal acts charged or else to estop the government from prosecution.[11] When there is sufficient evidence presented, "the right to have the jury instructed as to the defendant's theory of the case is one of those rights 'so basic to a fair trial' that failure to

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10. A reasonable belief that one has been authorized to commit an illegal act is an established defense in New York when, as here, specific intent is an element of the offense. *People v. Marrero*, 69 N.Y. 2d 382, 390, 507 N.E.2d 1068, 1072, 515 N.Y.S. 2d 212, 216 (1987). *See also People v. Weiss*, 276 N.Y. 384, 12 N.E. 2d 514 (1938).

11. *Compare United States v. Opdahl*, 930 F.2d 1530 (11th Cir. 1991) (refusing to instruct jury on legal authority of IRS official to reach compromise to settle delinquent taxpayer's disputed liability was reversible error where instruction was central to defense theory of case that defendant intended his payment to undercover investigator to be legitimate settlement of his tax liability, and was supported by some evidence).

instruct . . . can never be considered harmless error." *United States v. Escobar De Bright*, 742 F.2d 1196, 1201 (9th Cir. 1984). Since the justification jury instruction charged by the trial judge could only be considered after the jury had determined that petitioners intentionally committed the offense, the jury was deprived of its ability to determine petitioners' states of mind,[12] and the petitioners were deprived of their constitutional right to have their guilt determined beyond a reasonable doubt. The petitioners were entitled to have a jury decide whether the failure of the FBI to abide by its § 533 and its own internal Guidelines affected petitioners intent to commit the crimes charged, or else estopped the State government from prosecution, which agreed in 1981 to allow the FBI to supervise petitioners on the state's behalf in return for providing the state information obtained from petitioners.[13]

In *United States v. Abcasis*, 45 F.3d 39, 42-3 (2d Cir. 1995), the Second Circuit held that that conviction of a defendant is barred when the "commission of the crime arises from government solicitation or suggestion, coupled with a reasonable belief on the part of the defendant that he was authorized by agents of the government to commit the acts." The

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12. The trial judge below stated "There is no such thing as lack of intent. I am not going to charge that. I am not going to say they have to show they intended to commit the crime. There is no question they did intend to commit the crime. That's not the defense, and if it is the defense, they are on their own and I won't let them argue that to the jury." (Vol. 6: 5450-51).

13. *Compare Beard v. Mitchell*, 604 F.2d 485, 495 (7th Cir. 1979) (FBI supervising agent "was entitled to prove that his belief in the legality of his acts was reasonable but was not required to prove that his conduct was reasonable. The questions are distinct. For example, if the jury members had determined that it was grossly unreasonable for [defendant] to use a criminal informant, they still could have exonerated him if they found that he was merely acting in accordance with FBI guidelines in the reasonable belief that such conduct would thereby be lawful.").

*Abcasis* court stated that even the mere request by government agents for "continuing delivery of information could easily have been understood as authorization." *Id.* at 44. "The doctrine of entrapment by estoppel "depends on the unfairness of prosecuting one who has been led by the conduct of government agents to believe his acts were authorized." *Id.*

At least one state court has applied an entrapment by estoppel analysis in its review of a state criminal case. *Commonwealth v. Twitchell*, 617 N.E. 2d 609 (Mass. 1993). The *Twitchell* court found that there was "a substantial risk of a miscarriage of justice" as a result of the trial court's failure to charge the jury on the affirmative defense that the Twitchells reasonably believed that they could rely on the state law provision providing for spiritual treatment without fear of criminal prosecution. *Twitchell*, 617 N.E. 2d at 612-13. And, at least one New York case specifically held that, under certain circumstances, the state government may be estopped from pursuing a criminal prosecution as a result of its conduct. *People v. Donovan*, 53 Misc. 2d 687, 689, 279 N.Y.S. 2d 404, 407 (1967) (holding the state was estopped from prosecuting drunk defendant instructed by the police to drive away after finding her sleeping in her car). "In determining whether a factual basis for the instruction [of entrapment by estoppel] exists, the evidence must be reviewed in the light most favorable to the defendant." *United States v. Billue*, 994 F.2d 1562, 1568 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 939 (1994).

While it is true that a government's passive tolerance of a private informant's criminal conduct may be less egregious than conscious direction or enticement, at some point passive tolerance merits estoppel or a jury instruction regarding a defendant's intent or government misconduct. *Cf. United States v. Simpson*, 813 F.2d 1462, 1466 (9th Cir. 1987), *cert. denied*, 484 U.S. 898. The petitioners' supervising agents testified they

informed petitioners of the Guidelines. If true, petitioners were thus told they would be dismissed if they engaged in unauthorized criminal activity. Since the FBI agents admitted at trial that, over the years, they discussed with petitioners the criminal activity for which they were ultimately convicted, simply not being dismissed as an informant would lead a reasonable person, some time before ten years, to believe those actions were authorized by the FBI

Justice Holmes observed that while "it is not likely that a criminal carefully will consider the text of the law before he murders or steals, it is reasonable that a fair warning be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle v. United States*, 283 U.S. 25, 27 (1931). Due process and fair notice require that two things be made clear: first, the line distinguishing the lawful from the unlawful, and second, what the law intends to do if that line is crossed. To disallow the application of this defense to the instant case would "sanction an indefensible sort of entrapment by the State." *Cox v. Louisiana*, 379 U.S. 559, 571 (1965), (*citing Raley v. Ohio*, 360 U.S. 423 (1959).

That petitioners were not able to present these arguments to the jury is a result inconsistent with accepted Supreme Court precedents, common sense, and public policy. "[I]t offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Speiser v. Randall*, 357 U.S. 513, 523 (1958).

## CONCLUSION

The petition for a writ of certiorari should be granted. Petitioners submit that this appeal brings before the court substantial federal questions which require plenary consideration, with briefs on the merits and oral argument, for their resolution. In the alternative, petitioners respectfully request this Court issue a summary reversal.

Respectfully submitted,

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## APPENDIX A —CERTIFICATE DENYING LEAVE OF THE COURT OF APPEALS, STATE OF NEW YORK DATED DECEMBER 20, 1995

**State of New York**
**Court of Appeals**

BEFORE: HON. HOWARD A. LEVINE, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

BENITO IADAROLA,

Appellant.

CERTIFICATE DENYING LEAVE

I, HOWARD A. LEVINE, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied. The request for a stay is denied as academic.

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* Description of Order: Order of the Appellate Division, Second Department of December 4, 1995 affirming a judgment of Supreme Court, Kings County rendered July 6, 1994

*Appendix A*

Dated at Albany, New York
December 20, 1995

s/ Howard A. Levine
Associate Judge

## APPENDIX B — CERTIFICATE DENYING LEAVE OF THE COURT OF APPEALS, STATE OF NEW YORK DATED DECEMBER 20, 1995

**State of New York**
**Court of Appeals**

BEFORE: HON. HOWARD A. LEVINE, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

VICTOR IADAROLA,

Appellant.

CERTIFICATE DENYING LEAVE

I, HOWARD A. LEVINE, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied. The request for a stay is denied as academic.

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* Description of Order: Order of the Appellate Division, Second Department of December 4, 1995 affirming a judgment of Supreme Court, Kings County rendered July 6, 1994

*Appendix B*

Dated at Albany, New York
December 20, 1995

s/ Howard A. Levine
Associate Judge

## APPENDIX C — OPINION OF THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

## PEOPLE V. BENITO IADAROLA

94-06442

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

634 N.Y.S.2d 738; 1995 N.Y. App. Div. LEXIS 12516

November 13, 1995, Argued
December 4, 1995, Decided

NOTICE: [*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

PRIOR HISTORY: Appeal by the defendant from a judgment of the Supreme Court, Kings County (Rappaport, J.), rendered July 6, 1994, convicting him of enterprise corruption, upon a jury verdict, and imposing sentence. *1

DISPOSITION: ORDERED that the judgment is affirmed, and the matter is remitted to the Supreme Court, Kings County, for further proceedings pursuant to CPL 460.50(5).

COUNSEL: Jerome Karp, Brooklyn, N.Y. (Howard Altschuler on the brief), for appellant.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Roseann B. MacKechnie, Michael Gore, Ann Bordley, and William M. Harrington of counsel), for respondent.

*Appendix C*

JUDGES: WILLIAM C. THOMPSON, J.P., DAVID S. RITTER, DANIEL W. JOY, ANITA R. FLORIO, JJ.

OPINION: DECISION & ORDER

The defendant argues, similarly to his codefendant (see, *People v. Victor Iadarola,* A.D.2d [decided herewith]), that the trial court erred by failing to instruct the jury that he should be acquitted if he reasonably believed that the Federal Bureau of Investigation (hereinafter the F.B.I.) had authorized him to engage in criminal activities in connection with his role as a confidential [*2] informant. This defense, as set forth in *United States v. Abcasis* 634 N.Y.S.2d 738; 1995 N.Y. App. Div. LEXIS 12516, *2 (45 F.3d 39), has no basis in New York law. The trial court properly and adequately instructed the jury that, if it found the defendant guilty of the crimes with which he was charged, it should then consider whether the defendant's actions were justified pursuant to Penal Law § 35.05(1), which provides in pertinent part that criminal conduct is justified and not criminal if it is performed by a public servant in the reasonable exercise of his duties. In any event, no reasonable view of the evidence that was adduced at trial supports this defense.

The defendant's sentence is not excessive (see, *People v. Suitte,* 90 A.D.2d 80, 455 N.Y.S.2d 675).

THOMPSON, J.P., RITTER, JOY and FLORIO, JJ., concur.

## APPENDIX D — OPINION OF THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

## PEOPLE V. VICTOR IADAROLA

94-06445

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

634 N.Y.S.2d 738; 1995 N.Y. App. Div. LEXIS 12517

November 13, 1995, Argued
December 4, 1995, Decided

NOTICE: [*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

PRIOR HISTORY: Appeal by the defendant from a judgment of the Supreme Court, Kings County (Rappaport, J.), rendered July 6, 1994, convicting him of enterprise corruption, upon a jury verdict, and imposing sentence. 634 N.Y.S.2d 738; 1995 N.Y. App. Div. LEXIS 12517, *1

DISPOSITION: ORDERED that the judgment is affirmed, and the matter is remitted to the Supreme Court, Kings County for further proceedings pursuant to CPL 460.50(5).

COUNSEL: Albert J. Brackley, Brooklyn, N.Y., for appellant.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Roseann B. MacKechnie, Michael Gore, Ann Bordley, and William M. Harrington of counsel), for respondent.

*Appendix D*

JUDGES: WILLIAM C. THOMPSON, J.P., DAVID S. RITTER, DANIEL W. JOY, ANITA R. FLORIO, JJ.

OPINION: DECISION & ORDER

The defendant's conviction arose from his participation with his brother (see, People v. Benito Iadarola, A.D.2d [decided herewith]) and others in a pattern of illegal gambling activity from November 1988 to July 1991. The defendant contends that the People failed to prove his guilt beyond a reasonable doubt. Viewing the evidence in the light most favorable to the People (*People v. Contes*, 60 N.Y.2d 620, 467 N.Y.S.2d 349, 454 N.E.2d 932), we find [*2] that it is legally sufficient to establish the defendant's guilt beyond a reasonable doubt. The defense of justification was disproven by the People beyond a reasonable doubt (see, Penal Law § 25.00[1]; § 35.05[1]).

Contrary to the defendant's contention, the trial court properly denied the defendant's request to charge the jury that he lacked the intent to commit the crimes with which he was charged because, as a confidential informant, he had a reasonable belief that the Federal Bureau of Investigation (hereinafter the F.B.I.) had given him the authority to commit those crimes. There is no proof that the defendant did not intend to participate in the gambling enterprise with which he was charged. However, in view of the fact that the defendant presented evidence suggesting that he was an F.B.I. informant, the trial court properly instructed the jury that, if it found the defendant guilty of the crime of enterprise corruption, it should then consider whether the defendant's actions were justified pursuant to Penal Law § 35.05(1), which provides in pertinent part that criminal conduct is justified and not criminal if it is performed by a public servant in the reasonable exercise [*3] of his duties.

*Appendix D*

The defendant's sentence is not excessive (see, *People v. Suitte*, 90 A.D.2d 80, 455 N.Y.S.2d 675).

THOMPSON, J.P., RITTER, JOY and FLORIO, JJ., concur.

# APPENDIX E — RELEVANT STATUTES AND REGULATIONS

## 28 U.S.C. § 534

Acquisition, preservation, and exchange of identification records and information; appointment of officials

(a) The Attorney General shall —

(1) acquire, collect, classify, and preserve identification, criminal identification, crime, and other records;

(2) acquire, collect, classify, and preserve any information which would assist in the identification of any deceased individual who has not been identified after the discovery of such deceased individual;

(3) acquire, collect, classify, and preserve any information which would assist in the location of any missing person (including an unemancipated person as defined by the laws of the place of residence of such person) and provide confirmation as to any entry for such a person to the parent, legal guardian, or next of kin of that person (and the Attorney General may acquire, collect, classify, and preserve such information from such parent, guardian, or next of kin);

(4) exchange such records and information with, and for the official use of, authorized officials of the Federal Government, the States, cities, and penal and other institutions.

(b) The exchange of records and information authorized by subsection (a)(4) of this section is subject to cancellation if dissemination is made outside the receiving departments or related agencies.

(c) The Attorney General may appoint officials to perform the functions authorized by this section.

(d) For purposes of this section, the term "other institutions" includes —

(1) railroad police departments which perform the administration of criminal justice and have arrest powers pursuant to a State statute, which allocate a substantial part of their annual budget to the administration of criminal justice, and which meet training requirements established by law or ordinance for law enforcement officers; and

(2) police departments of private colleges or universities which perform the administration of criminal justice and have arrest powers pursuant to a State statute, which allocate a substantial part of their annual budget to the administration of criminal justice, and which meet training requirements established by law or ordinance for law enforcement officers.

(e)(1) Information from national crime information databases consisting of identification records, criminal history records, protection orders, and wanted person records may be disseminated to civil or criminal courts for use in domestic violence or stalking cases. Nothing in this subsection shall be construed to permit access to such records for any other purpose.

(2) Federal and State criminal justice agencies authorized to enter information into criminal information databases may include —

(A) arrests, convictions, and arrest warrants for stalking or domestic violence or for violations of protection orders for the protection of parties from stalking or domestic violence; and

(B) protection orders for the protection of persons from stalking or domestic violence, provided such orders are subject to periodic verification.

(3) As used in this subsection —

(A) the term "national crime information databases" means the National Crime Information Center and its incorporated criminal history databases, including the Interstate Identification Index; and

(B) the term "protection order" includes an injunction or any other order issued for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to, another person, including temporary and final orders issued by civil or criminal courts (other than support or child custody orders) whether obtained by filing an independent action or as a pendente lite order in another proceeding so long as any civil order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection.

**28 U.S.C. § 547**

Duties

Except as otherwise provided by law, each United States attorney, within his district, shall —

(1) prosecute for all offenses against the United States;

(2) prosecute or defend, for the Government, all civil actions, suits or proceedings in which the United States is concerned;

(3) appear in behalf of the defendants in all civil actions, suits or proceedings pending in his district against collectors, or other officers of the revenue or customs for any act done by them or for the recovery of any money exacted by or paid to these officers, and by them paid into the Treasury;

(4) institute and prosecute proceedings for the collection of fines, penalties, and forfeitures incurred for violation of any revenue law, unless satisfied on investigation that justice does not require the proceedings; and

(5) make such reports as the Attorney General may direct.

**28 C.F.R. 0.85**

PART 0 — ORGANIZATION OF THE DEPARTMENT OF JUSTICE, SUBPART P — FEDERAL BUREAU OF INVESTIGATION, @ 0.85 General functions.

The Director of the Federal Bureau of Investigation shall:

(a) Investigate violations of the laws, including the criminal drug laws, of the United States and collect evidence in cases in which the United States is or may be a party in interest, except in cases in which such responsibility is by statute or otherwise specifically assigned to another investigative agency. The Director's authority to investigate violations of and collect evidence in cases involving the criminal drug laws of the United States is concurrent with such authority of the Administrator of the Drug Enforcement Administration under @ 0.100 of this part. In investigating violations of such laws and in collecting evidence in such cases, the Director may exercise so much of the authority vested in the Attorney General by sections 1 and 2 of

*Appendix E*

Reorganization Plan No. 1 of 1968, section 1 of Reorganization Plan No. 2 of 1973 and the Comprehensive Drug Abuse Prevention and Control Act of 1970, as amended, as he determines is necessary. He may also release F.B.I. information on the same terms and for the same purposes that the Administrator of the Drug Enforcement Administration may disclose DEA information under @ 0.103 of this part. The Director and his authorized delegates may seize, forfeit and remit or mitigate the forfeiture of property in accordance with 21 U.S.C. 881, 21 C.F.R. 1316.71 through 1316.81, and 28 C.F.R. 9.1 through 9.7.

(b) Conduct the acquisition, collection, exchange, classification and preservation of fingerprint cards and identification records from criminal justice and other governmental agencies, including fingerprint cards voluntarily submitted by individuals for personal identification purposes; provide expert testimony in Federal, State and local courts as to fingerprint examinations; and provide fingerprint training and provide identification assistance in disasters and for other humanitarian purposes.

(c) Conduct personnel investigations requisite to the work of the Department of Justice and whenever required by statute or otherwise.

(d) Carry out the Presidential directive of September 6, 1939, as reaffirmed by Presidential directives of January 8, 1943, July 24, 1950, and December 15, 1953, designating the Federal Bureau of Investigation to take charge of investigative work in matters relating to espionage, sabotage, subversive activities, and related matters.

(e) Establish and conduct law enforcement training programs to provide training for State and local law enforcement personnel; operate the Federal Bureau of Investigation National Academy; develop new approaches, techniques, systems, equipment, and devices to improve and strengthen law enforcement and assist in conducting State and local training programs, pursuant to section 404 of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 204.

(f) Operate a central clearinghouse for police statistics under the Uniform Crime Reporting Program, and a computerized nationwide index of law enforcement information under the National Crime Information Center.

(g) Operate the Federal Bureau of Investigation Laboratory to serve not only the Federal Bureau of Investigation, but also to provide, without cost, technical and scientific assistance, including expert testimony in Federal or local courts, for all duly constituted law enforcement agencies, other organizational units of the Department of Justice, and other Federal agencies, which may desire to avail themselves of the service. As provided for in procedures agreed upon between the Secretary of State and the Attorney General, the services of the Federal Bureau of Investigation Laboratory may also be made available to foreign law enforcement agencies and courts.

(h) Make recommendations to the Office of Personnel Management in connection with applications for retirement under 5 U.S.C. 8336(c).

(i) Investigate alleged fraudulent conduct in connection with operations of the Department of Housing and Urban Development and other alleged violations of the criminal

provisions of the National Housing Act, including 18 U.S.C. 1010.

(j) Exercise the power and authority vested in the Attorney General to approve and conduct exchanges of identification records with officials of federally chartered or insured banking institutions to promote or maintain the security of those institutions and, if authorized by State statute and approved by the Attorney General, to officials of State and local governments for purposes of employment and licensing; and exercise the power and authority vested in the Attorney General by 15 U.S.C. 78q(f)(2) and 7 U.S.C. 12a, to approve and conduct exchanges of identification records with certain segments of the securities industry and the Commodity Futures Trading Commission, respectively.

(k) Payment of awards (including those over $ 10,000) under 28 U.S.C. 524(c)(2), and purchase of evidence (including the authority to pay more than $ 100,000) under 28 U.S.C. 524(c)(1)(F).

(l) Exercise Lead Agency responsibility in investigating all crimes for which it has primary or concurrent jurisdiction and which involve terrorist activities or acts in preparation of terrorist activities within the statutory jurisdiction of the United States. Within the United States, this would include the collection, coordination, analysis, management and dissemination of intelligence and criminal information as appropriate. If another Federal agency identifies an individual who is engaged in terrorist activities or in acts in preparation of terrorist activities, that agency is requested to promptly notify the F.B.I.. Terrorism includes the unlawful use of force and violence against persons or property to intimidate or coerce a

government, the civilian population, or any segment thereof, in furtherance of political or social objectives.

(m) Carry out the Department's responsibilities under the Hate Crime Statistics Act.

(n) Exercise the authority vested in the Attorney General under section 528(a), Public Law 101-509, to accept from federal departments and agencies the services of law enforcement personnel to assist the Department of Justice in the investigation and prosecution of fraud or other criminal or unlawful activity in or against any federally insured financial institution or the Resolution Trust Corporation, and to coordinate the activities of such law enforcement personnel in the conduct of such investigations and prosecutions.

(o) Carry out the responsibilities conferred upon the Attorney General under the Communications Assistance for Law Enforcement Act, Title I of Pub. L. 103-414 (108 Stat. 4279), subject to the general supervision and direction of the Attorney General.

**28 C.F.R. 0.85a**

Criminal justice policy coordination.

The Federal Bureau of Investigation shall report to the Attorney General on all its activities.

*Appendix E*

## New York Penal Law § 35.05

Justification; generally

Unless otherwise limited by the ensuing provisions of this article defining justifiable use of physical force, conduct which would otherwise constitute an offense is justifiable and not criminal when:

1. Such conduct is required or authorized by law or by a judicial decree, or is performed by a public servant in the reasonable exercise of his official powers, duties or functions; or

2. Such conduct is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding such injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue. The necessity and justifiability of such conduct may not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder. Whenever evidence relating to the defense of justification under this subdivision is offered by the defendant, the court shall rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a defense.

*Appendix E*

## New York Penal Law § 460.20

Enterprise corruption

1. A person is guilty of enterprise corruption when, having knowledge of the existence of a criminal enterprise and the nature of its activities, and being employed by or associated with such enterprise, he:

(a) intentionally conducts or participates in the affairs of an enterprise by participating in a pattern of criminal activity; or

(b) intentionally acquires or maintains any interest in or control of an enterprise by participating in a pattern of criminal activity; or

(c) participates in a pattern of criminal activity and knowingly invests any proceeds derived from that conduct, or any proceeds derived from the investment or use of those proceeds, in an enterprise.

2. For purposes of this section, a person participates in a pattern of criminal activity when, with intent to participate in or advance the affairs of the criminal enterprise, he engages in conduct constituting, or, is criminally liable for pursuant to section 20.00 of this chapter, at least three of the criminal acts included in the pattern, provided that:

(a) Two of his acts are felonies other than conspiracy;

(b) Two of his acts, one of which is a felony, occurred within five years of the commencement of the criminal action; and

*Appendix E*

(c) Each of his acts occurred within three years of a prior act.

3. For purposes of this section, the enterprise corrupted in violation of subdivision one of this section need not be the criminal enterprise by which the person is employed or with which he is associated, and may be a legitimate enterprise.

Enterprise corruption is a class B felony.